

**Letter of Findings: 10-0162
Sales and Use Tax
For the Tax Years 2007 and 2008**

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ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-5-54](#); Commissioner's Directive 25, 27 Ind. Reg. 3381 (July 1, 2004).

Taxpayer protests the imposition of sales tax on its vehicle sales to out-of-state customers.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana automobile dealer, which sells new and used cars. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer sold vehicles to out-of-state customers without collecting sales tax or without obtaining the documentation required in order to be exempt. The audit also concluded that Taxpayer failed to collect sales tax on the sales of extended/optional warranties to its customers. Additionally, the audit found that Taxpayer purchased certain tangible personal property without paying sales tax or self-assessing and remitting the use tax to the Department. As a result, the audit assessed Taxpayer additional sales and use taxes, penalty, and interest.

In addition to protesting the imposition of penalty, Taxpayer protests the assessments regarding its vehicle sales to out-of-state customers and sales of extended/optional warranties. A hearing was held. At the hearing, Taxpayer withdrew its protest on sales of extended/optional warranties but continued to protest the remaining issues. This Letter of Findings ensues and addresses the remaining issues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition.

DISCUSSION

The Department assessed sales tax on Taxpayer's vehicle sales to out-of-state purchasers because Taxpayer failed to document that it delivered the vehicles to out-of-state purchasers. Taxpayer, to the contrary, argued that since the purchasers resided in states other than Indiana and, therefore, the sales to these out-of-state purchasers were exempt "out-of-state sales."

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Taxpayer, a dealer, is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

[45 IAC 2.2-5-54](#) states:

- (a) Delivery to purchaser in Indiana. Sales of tangible personal property which are delivered to the purchaser in Indiana are subject to gross retail tax or use tax, except (see Regs. 6-2.5-5-15(020) [[45 IAC 2.2-5-22](#)]) for certain sales of motor vehicles and aircraft.
- (b) Delivery to purchaser in a state other than Indiana. Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.
- (c) Delivery by common carriers.
 - (1) Delivery to common carrier in Indiana for shipment to another state by common carrier shall be deemed delivery to a purchaser in a state other than Indiana for purposes of applying the gross retail tax or use tax.
 - (2) Delivery to common carriers in a state other than Indiana for shipment to Indiana shall be deemed delivery to a purchaser in Indiana for purposes of applying the use tax.

The Department issued Commissioner's Directive 25, 27 Ind. Reg. 3381 (July 1, 2004), to address the issue

of sales to out-of-state purchasers and stated that:

For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.

Taxpayer, a dealer, sold vehicles to out-of-state purchasers and claimed that these sales were exempt from Indiana sales tax. However, when out-of-state purchasers came to Indiana and took possession of the vehicles at the time of the transactions in Indiana, the sales were Indiana sales and subject to Indiana sales tax. Only when Taxpayer delivers the vehicles out of state to out-of-state purchasers, are the sales considered exempt out-of-state sales. Thus, pursuant to [45 IAC 2.2-5-54](#) and Commissioner's Directive 25, Taxpayer must document that it delivered the vehicles out of state to the out-of-state purchasers to be relieved from collecting and remitting Indiana sales tax.

Prior to the administrative hearing, Taxpayer submitted additional documentation demonstrating that it delivered some of the vehicles out of state to out-of-state customers. The Department, thus, agrees that Taxpayer was relieved from collecting and remitting Indiana sales tax on the following items:

Audit Page	Date	Reference	Vehicle Description	Amount
Page 21	06/20/2008	10162A	2005 Chevy Impala	\$ 3,682.00
Page 21	11/15/2008	10231	2005 Ford F150	\$ 6,385.00
Page 22	09/29/2008	8299C	2004 Chevrolet Silverado	\$13,995.00
Page 22	05/23/2008	81064	2008 Ford Edge	\$29,528.00
Page 23	12/27/2008	10001A	2007 Ford Edge	\$12,850.00
Page 23	08/26/2008	81068	2008 Ford F150	\$23,720.00

Taxpayer, however, remains responsible for collecting Indiana sales tax on the remainder of its sales to out-of-state customers, for which either no records or incomplete records of delivery were provided. The Department will recalculate the assessment in a supplemental audit.

FINDING

Taxpayer's protest is sustained in part and respectfully denied in part. The Department will recalculate the assessment in a supplemental audit.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the assessment of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer did not provide documentation establishing that its failure was due to reasonable cause and not due to negligence. As explained in [45 IAC 15-11-2\(b\)](#), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."

FINDING

Taxpayer's protest on the imposition of the negligence penalty is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of Issue I regarding its vehicle sales to out-of-state purchasers is sustained in part and denied in part. Taxpayer's protest of the negligence penalty is respectfully denied. The Department will recalculate the assessment in a supplemental audit.

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